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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-.....

76-539

DAYTON BOARD OF EDUCATION, et al.,

Petitioners,

v.

MARK BRINKMAN, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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In the

Supreme Court of the United States

October Term, 1976

No. 76-.....

Dayton Board of Education, et al.,

Petitioners,

v.

Mark Brinkman, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The July 26, 1976, opinion of the Court of Appeals, stay denied August 19, 1976 (Circuit Justice Stewart), is not yet reported. The two prior opinions of the Court of Appeals are reported. 518 F.2d 684 (1975), cert. denied 423 U.S. 1000 (1975); 503 F.2d 684 (1974). The opinions of the District Court are unreported. (These opinions of the courts below appear in the appendix attached to the Dayton Board's Petition for Certiorari and will be cited in this Opposition as App. a.*)

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* Although the record evidence from previous violation and remedial hearings is voluminous, reference to record evidence in this Opposition will be limited to the most recent set of remedial hearings below in December, 1975, and March, 1976, cited as R. — .

Jurisdiction

The Court of Appeals' judgment affirming a plan of desegregation required to eliminate the *de jure* segregated system of schooling previously found (App. 118a-123a) was entered on July 26, 1976. This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether any issue warranting this Court's review is presented by the Court of Appeals' affirmance of a plan of desegregation required to eliminate the *de jure* segregation within the Dayton Public Schools consistent with the standards enunciated in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) and *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Statement

A. Plaintiffs commenced this school desegregation action in April, 1972, against city and state officials having responsibility for the maintenance and operation of the public schools of Dayton, Ohio. After an evidentiary hearing, the District Court in February, 1973, found a constitutional violation (App. 12a)—on the basis of its findings that there was substantial segregation in the racial composition of Dayton schools; that defendants had utilized optional or dual attendance zones; and that other board action, both historic and recent, also contributed to the segregation.[1]

[1] E.g., the illegal rescission, during the 1971-72 school year, of a system-wide program of desegregation (App. 10a-11a); explicit "physical segregation" of teachers, pupils, facilities and programs among and within schools pre-*Brown* (App. 2a-3a); intentional creation and maintenance of the Dunbar High School as a city-wide, all-black secondary school (App. 4a-5a).

The District Court held "that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education*" (App. 12a). Accordingly, the District Court directed the school board to prepare a plan for desegregation consistent with *Swann* and *Davis* (App. 13a-14a, 34a).

After submission of alternative plans and objections by the parties, but without evidentiary hearing, the District Court in July, 1973, adopted the proposal of the Dayton Board majority to eliminate dual zones, to revise transfer priorities, and to provide part-time integration for some students in a few programs; the District Court also required the Board to adopt a "free-choice" plan for all high schools (see, App. 35a-36a). Although expressing disappointment with the limited nature of the Board majority's proposal (App. 27a), the District Court rejected the comprehensive plan of the Board minority.

Plaintiffs (here the Respondents) appealed; and the Dayton Board (here the Petitioners) cross-appealed.

B. On August 20, 1974, the Sixth Circuit affirmed the District Court's ultimate finding that the Dayton schools were unlawfully segregated by race (App. 56a). In addition to the evidence specified by the District Court as part of violation (App. 39a-56a), the Court of Appeals also reviewed defendants' other discriminatory practices promoting and perpetuating racial segregation in the assignment of faculty and staff (App. 56a-61a), in the location and construction of new schools (App. 61a-64a), in the reorganization of grade structures (App. 64a-65a), and in student transfers and transportation (App. 65a-66a).[2] The

[2] For example, the Court of Appeals noted that prior to 1951 faculty and staff were assigned on a racial basis "pursuant to an explicit segregation policy of the Board . . ."; thereafter a new

Court of Appeals concluded that "the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations" (App. 68a) and remanded the case for further remedial steps consistent with *Swann Keyes* and *Milliken (Id.)*.

Certiorari was not sought.

C. Following remand of the case, the board majority and the plaintiffs each presented separate plans to the District Court. The board majority plan (see App. 91a-92a) was essentially a limited expansion of the prior plan—a modified freedom of choice plan calling for the establishment in some schools of programs not offered in others. These special program schools would be called "magnet schools" and "learning centers." The programs offered were to be designed to attract a limited bi-racial enrollment on a voluntary and, in the main, part-time basis (see App. 91a-92a). In contrast, the plaintiffs' plan used traditional techniques of rezoning, pairing, and grouping of schools. On March 10, 1975, while expressing confusion over the applicable legal standards concerning *de jure* segregation, the District Court provisionally accepted the board majority's plan for the 1975-76 school year (App. 83a-84a). The District Court recognized the very limited nature of the proposals, as well as the school board's failure to consider more promising alternative methods of accomplishing desegregation (App. 80a-81a). The board was directed to study the feasibility of adopting more significant measures for the following school year (App. 81a).

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policy "effectively continued in practice the racial assignment of faculty through the 1970-71 school year" (App. 56a). With respect to school construction, the Court of Appeals noted "that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid-1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas" (App. 62a).

The plaintiffs immediately appealed, moving for summary reversal and requesting specific remedial directives from the Court of Appeals; for after two years' experience with the Dayton Board's prior special programs and part-time desegregation, the systematic pattern of segregation had remained unchanged. The defendants did not cross-appeal.

D. In its June 24, 1975, opinion, the Court of Appeals [to clear-up the District Court's confusion] again summarized the nature of the violation and the applicable law in this case (App. 89a-90a):

> Segregative acts and practices were found to have occurred both before and after the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion. . . . Sufficient to say that . . . these findings of fact . . . are supported by substantial evidence.[3] Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. See *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

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[3] The evidence of constitutional violation is more than substantial. For example, the evidence shows that just prior to *Brown* over half of the black students and *all* of the black teachers were isolated in four *all*-black schools as a direct result of the Board's intentionally segregative practices (App. 39a, 50a, 56a) and that, thereafter, staff continued to be assigned on a racial basis (App. 56a), new schools and additions opened almost always on a virtually uniracial basis (App. 62a), racially dual optional zones operated at one time or another to directly affect segregation at over 30 schools (e.g., App. 53a) and the Board deliberately chose in 1971 to perpetuate this pattern of segregation system-wide (App. 55a).

The Court of Appeals noted the inadequacy of the District Court's "remedy." After describing the plan (App. 91a-92a), the Court of Appeals held that the plan failed to remedy the violation of the constitution and failed to obey the previous mandate:

> Under the plan . . . the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools . . ., and the vast majority of one-race schools will remain identifiable as such.

(App. 92a-93a). Accordingly, the Court of Appeals remanded the case to the District Court for further proceedings with directions, *inter alia,* "that the District Court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*" (App. 96a). The Court of Appeals directed that such a plan be adopted by December 31, 1975, for implementation in September 1976.

The Dayton Board petitioned for a writ of certiorari to review this judgment. This Court denied certiorari on December 2, 1975. 423 U.S. 1000.

E. On remand the District Court took action to implement the directions of the Court of Appeals. The District Court immediately appointed an expert, Dr. Charles Glatt, to assist in preparing and evaluating desegregation plans for the Dayton Public Schools. In the midst of his work, Dr. Glatt was murdered. On November 5, 1975, the Court directed the parties to submit proposed plans and appointed Dr. John A. Finger, Jr., as a court expert.

On December 8-9, 1975, the District Court held hearings to consider plans proposed by plaintiffs and friends of

Dr. Glatt, as well as a plan "presented" by a team of Board-appointed experts but neither "proposed" nor "recommended" by the Dayton Board.[4] The plans utilized different techniques to accomplish desegregation. Plaintiffs' plan utilized traditional pairing, clustering and zoning. The Board experts' proposal utilized, within racial desegregation limitations, diverse choice, zoning and curriculum differentiation mechanisms; but the proposal was inchoate in that actual assignments and provision for transportation were not included. R. 38-40, 52, 101, 136-7, 149-151, 188-191, 206-220. The testimony of all witnesses, including plaintiff and Board experts, was in agreement (1) that approximately 15,000 pupils would have to be provided transportation under either proposal; (2) that, because of Dayton's compact nature and thoroughfares, no threat would be presented by the time, distance, and amount of transportation involved in any effective desegregation plan to the health, safety, or education of the school children; and (3) that the proper object of a plan is to eliminate the *de jure* pattern of one-race schools in Dayton. Board Experts' plan at 127; App. 98a; R. 45-46, 71, 130-1, 218, 229-232, 249-252, 255-256.

On December 29, 1975, the District Court issued its order concerning the plans submitted, the December 8 hearings and future proceedings. In light of the two earlier failed

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[4] The Dayton Board expressly rejected approving, proposing, adopting, or recommending its experts' plan or any plan for the District Court's approval. See, App. 121a, where the Court of Appeals later noted, "[t]hough this Court ordered system-wide desegregation on the previous remand, the Board proposed no plan to achieve this mandate." Instead the Board authorized its attorney to present or submit its experts' plan, without Board approval, for the District Court's consideration. See, e.g., App. 116a; R. 203-4. Contrast the affirmative obligation imposed on the Board by *Green* v. *County School Board,* 391 U.S. 430, 438-439 (1968); and compare this continuing three-year pattern of Board conduct with the similar default confronted by the District Court in *Swann.* See, e.g., 402 U.S. at 8-11, 24 n. 8.

plans and after summarizing the different techniques of the two new plans, the very limited nature of federal judicial intervention to protect constitutional rights, and the broad discretion left to the Board on all educational policy and administrative matters, the District Court established a broad racial range (plus or minus 15% of the system-wide racial composition) as a starting point within which the Dayton Board was free to implement the desegregation plan of its choice (App. 103a). The District Court provided for modification of the broad racial guideline in the final plan, including excluding all present 10th through 12th graders and future kindergarten students from the plan and permitting the retention of other one-race or substantially disproportionate schools where shown to be required "by reason of geographic location" (App. 104a).

In its discretion, the District Court also established a priority of remedial devices designed to minimize pupil reassignments and transportation wherever feasible for elementary students (see, App. 119a-120); named Dr. Finger master to work with the defendant school authorities to assist in developing the necessary pupil assignment plan; and approved a representative citizen's board to monitor the plan for a period not to exceed three years (App. 104a-105a).

On March 22 and 23, 1976, the District Court held hearings on March 15 report of the Master concerning a final plan of desegregation for the 1976-77 school year. Working in consultation with the Dayton school administration, the Master reported on the proposed elementary plan which relied primarily on pairing and on a proposed plan for high school which relied on program choices and random assignments within racial guidelines. See, e.g., Report of the Master.[5] The Master estimated that the maximum

[5] From the evidence, it appeared that the Master basically accepted the Dayton school administration's elementary plan except insofar as the school authorities proposed to "phase-in" over a three year period, but opted for a choice mechanism over the Dayton administration's preference for rezoning some schools at the high school level. E.g., Report of the Master; R. 292 et seq.

distance would be somewhat in excess of five miles and that the longest travel time "should not much exceed twenty minutes." *Id.* at 8. See also, R. 391.

At the hearing the Dayton Board presented evidence in support of several modifications: to reassign pupils in advance in the spring by the central administration rather than by the principals in the paired schools on the first day of the 1976-77 school year; to transfer pupils (with no transfer of teachers) between the paired schools on an annual rather than semi-annual basis; to assign high school students on a geographic zone rather than choice and random assignment basis; and to phase-in the elementary plan over three years (including withholding some eight schools from the desegregation plan for the 1976-77 year). E.g. R. 288 et seq. The Board presented *no* argument, testimony, or any other evidence that any school or child should be excluded from the plan because of any geographic location or claim of excessive distance or time involved in reassignment and transportation.

Finally, the Master testified that he did not seek an arbitrary racial balance but rather operated pursuant to the broad and flexible guidelines established by the District Court to disestablish the *de jure* pattern of segregated schools (R. 339, 361-362). Thus, for example, the projected racial composition of high schools varied from 23% to 78% black[6] (R. 361-362; Report of the Master at 21).

[6] This wide variation results from the exclusion of next year's 11th and 12th graders from the plan. Report of the Master at 21. The projected enrollment for the elementary pairings fall within a narrower range under the final Master/Dayton school administration plan (*Id.*, 12-12a). However, these are only projections;

On March 23, 1976, the District Court issued its final order approving the proposed desegregation plan with modifications and directing the Dayton Board to implement that the plan for the 1976-77 school year. With respect to the modifications requested by the Dayton Board, the Court gave the Board the discretion either to implement the Master's report or the Board's proposed modification, except insofar as the Board sought a three-year phase-in (App. 111a). Subject to time constraints and desegregation requirements, the District Court expressed its willingness to consider additional proposals from any party to modify the plan (App. 112a-113a).

On May 11, 1976, the Dayton Board sought six additional modifications which the District Court granted on May 14, 1976, with one exception (concerning the exclusion of eighth graders from the plan)[7] (App. 117a).

The Dayton Board then appealed.

F. In its July 26, 1976, opinion, the Court of Appeals affirmed the judgment of the District Court after carefully reviewing the Board's primary claim that the plan amounted to forbidden "racial balance" (App. 121a). The Court of Appeals first noted that the Board had proposed *no* plan to meet the court's prior mandates of system-wide desegregation and made *no* showing relating to "the topography of the Dayton area, location of natural or artifi-

and no perennial reassignment provision was included, contemplated, or required by the District Court or permitted by the Court of Appeals (see, App. 123a).

[7] The District Court's rationale for excluding, in its discretion, 11th and 12th graders from the plan related to certain unique high school relationships, particularly in extra-curricular activities, already made by these "rising" 11th and 12th grade students. See, App. 101-102. Whatever merit this "rising" student option may have to the high school experience, the District Court was not persuaded of its substance with respect to elementary school children.

cial barriers, geographic isolation or similar [time and distance] considerations" which would require modification of the plan or justify the maintenance of particular one-race schools (App. 121a). "Compare *Goss* v. *Board of Education of Knoxville,* 482 F.2d 1044 (6th Cir. 1973), cert. denied, 414 U.S. 1171 (1974)" (*Id.*). Second, the court approved the District Court's use of a broad and flexible racial range, subject to modification upon proper showing, in initially shaping a plan. Application of the "plus or minus 15%" range in Dayton would permit "black enrollments at particular schools to range between 33% and 63%" even before the board modifications permitted (App. 121a). The court held that this limited use of "mathematical ratios" constituted "no more than 'a useful starting point' in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25" (App. 119a).[8] Finally, the court noted that the District Court's order applied, by its own terms, only to the 1976-77 school year and did not require any changes thereafter (App. 121a). The court concluded:

> The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years, the District Court will necessarily consider the limita-

[8] See also, Statement, pp. 7-9, *supra*. The Dayton Board's offhand suggestion that the Sixth Circuit has been or is bent on "racial balance" (see, Petition 16 n. 2) is an unwarranted attack. For the Sixth Circuit has closely reviewed each case in light of its particular facts and the local circumstances to insure that the substantive teachings of *Swann* have been properly applied in each case. Compare, *Brinkman, supra, with Goss* v. *Bd. of Education of Knoxville, supra; Mapp* v. *Board of Education,* 525 F.2d 169 (6th Cir., 1975); *Kelly* v. *Metropolitan County Bd. of Education,* 463 F.2d 732 (6th Cir., 1972) 508 F.2d 179 (6th Cir., 1974); *Oliver* v. *Michigan State Board of Education,* 508 F.2d 179 (6th Cir., 1974). This Court has denied certiorari from these decisions.

tions in *Spangler* [—— U.S. ——, 44 U.S.L.W. 5114, June 28, 1976] in dealing with such requests.

(App. 121a-122a).

On July 27, 1976, the Dayton Board filed a motion to stay the Judgment with the Court of Appeals, pending writ of certiorari. Pending the Court of Appeals' decision on that motion, the Dayton Board applied to Circuit Justice Stewart for a stay on August 10, 1976. The Court of Appeals denied the stay motion on August 16, 1976; Circuit Justice Stewart denied the application for stay on August 19, 1976. As a result, the desegregation plan has been implemented as required.

The Dayton Board now petitions for a writ of certiorari to review "the first constitutionally sufficient desegregation plan for the Dayton system."

Reasons Why the Writ Should Be Denied

This is a traditional, intra-district, *de jure* school segregation case which raises no new or important issue worthy of review by this Court. As with its previous petition, see 423 U.S. 1000 (1975), denying cert, from 518 F.2d 684 (6th Cir., 1975), the continuing attempt of the Dayton Board to fabricate such an issue is without merit:

1. The Dayton Board's argument that the nature of the violation is anecdotal and that the scope of the remedy must therefore be narrow (see, Pet. 17-19) flies in the face of the findings, conclusions and record below. As noted in the Statement, *supra*, the Dayton Board—in contravention of an 1887 Ohio statute and a 1926 state judicial decision involving the Dayton Board outlawing segregation—engaged in "repeated" acts of blatant, intentional segregation of pupils, teachers, facilities, and extracurricular

activities, including the intentional creation and maintenance of Garfield, Willard, Wogoman, and Dunbar as all-black schools (App. 39a-40a, App. 2a-5a). "Pursuant to an explicit segregation policy of the Board" (App. 56a), Dayton school authorities long assigned *all* black teachers only to all-black classes and schools. As a result, immediately prior to *Brown*, "over half of all black pupils [and *all* black teachers] were enrolled in the four *all* black schools." (App. 50a).[9] Thereafter, this long-standing pattern of segregation by one-race schooling continued without interruption through the time of trial (App. 50a-51a).[10] Cf., *Keyes, supra*, 413 U.S. at 206, 211. Since 1950, racially dual optional zones—which "destroy or dilute the neighborhood school" defense (App. 13a)—directly effected segregation at some thirty schools at one time or another; and there was direct evidence that some optional zones had "racial significance at the time of their creation" and "embraced desires motivated by racial considerations." (App. 51a-52a). Moreover, Dunbar,

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[9] There is no question that this rendered the Dayton school system "dual" in the *Keyes* sense, 413 U.S. at 201, 203, 211-213, at the time of *Brown*. See, e.g., App. 56a ("the basically dual school system inherited at the time of *Brown*").

[10] For example, the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." App. 56a. "The great majority of new schools and additions were located by the Board in either virtually all-black or all-white areas" and opened to virtually one-race student bodies and staff. E.g., App. 62a. There was also evidence that a racially identifiable middle-school reorganization, as well as racially identifiable transfers similarly operated at least to *maintain* this *de jure* pattern of segregation. E.g., App. 65a-66a. Under this Court's decisions in *Keyes* and *Swann*, there is no doubt that these practices, at a minimum, perpetuated the *de jure* system of segregation inherited if not also being independent *de jure* practices themselves. *Keyes*, 413 U.S. at 200-202, 210-213; *Swann*, 402 U.S. at 14, 20-21. In view of the scope of the other independent violations found, the Court of Appeals determined that it was unnecessary to determine whether these practices also violated the constitution. App. 66a-68a.

which "was intended to be and did in fact become a black high school" (App. 4a), remained a district-wide optional zone for "blacks only" through 1962 (App. 5a). By its unlawful rescision in 1972 of a district-wide program of desegregation, the Dayton Board deliberately chose to perpetuate the *de jure* pattern of segregation system-wide (App. 53a-56a; App. 42a-48a). And the Dayton Board presented no evidence showing that the Dayton school system could be divided into "separate, identifiable, and unrelated units," *Keyes*, 413 U.S. at 203, nor that any school or portion of the Dayton Public Schools is geographically isolated (e.g., App. 121a).

In these circumstances, the nature and extent of the constitutional violation are unquestionably substantial and pervasive: *de jure* segregation of the Dayton Public Schools. The court below was manifestly correct in so holding on each appeal (e.g., App. 121a; App. 89a-90a, App. 96a; App. 32a-69a). A system-wide desegregation plan was therefore necessary to remedy the constitutional violation here[11] (App. 96a, 119a). See, e.g., *Swann*, 402 U.S. at 25-30; *Davis* v. *Board of School Commissioners*, 402 U.S. 1, 37 (1972); *Keyes*, 413 U.S. at 214, *Milliken* v. *Bradley*, 418 U.S. at 746, 752 (1974).

[11] For this reason, the decisions and desegregation plan ordered below do not conflict in any way with the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 et seq. As the Court of Appeals held on the prior appeal, "the 1974 Act, read as a whole, does not limit either the nature or scope of the remedy for constitutional violations in the instant case." App. 95a. The 1974 Act provides specifically that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. 1702 (b). This Court did not deem this plainly correct judgment of the Court of Appeals worthy of review on the Dayton Board's previous petition for certiorari. 423 U.S. 1000 (1975). Cf., *Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, Circuit Justice).

Thus, with respect to the questions sought to be raised by the Dayton Board concerning the nature of the constitutional violation and the scope of an adequate remedy, the Court of Appeals has adhered scrupulously to the decisions of this Court in *Swann, Keyes, Milliken* and *Spangler* in this traditional, intra-district, *de jure* segregation case. There is no conflict with the decisions of this Court, the Sixth Circuit, or any of the other Court of Appeals. To the contrary, the judgment of the Court of Appeals is manifestly correct.[12] There is *no* reason for granting certiorari to review the judgment below. See, e.g., *United States* v. *School District No. 151*, 432 F.2d 1147 (7th Cir., 1970), cert. denied, 402 U.S. 943 (1971); *Davis* v. *School District*, 443 F.2d 573 (6th Cir.), cert. denied, 404 U.S. 913 (1971); *Kelly* v. *Guinn*, 456 F.2d 100

[12] In an attempt to suggest some conflict or issue worthy of review, the Dayton Board on this petition again refers to the District Court's passing remarks after the first remand for further remedial proceedings, to the effect that the Dayton school system had never been "dual." See, e.g., Pet. 17-18, 26. However, the remarks relate only to the District Court's continuing confusion over semantics. The District Court apparently acted under the impression that the phrases "dual" or "*de jure*" are talismanic and apply only to explicit segregation policies mandated by state law or local ordinance, not to the intentional segregation practices of school authorities. See, e.g., App. 11a-12a; 75a, 77a. On the second appeal, the Court of Appeals responded directly to the District Court's confusion by making explicit what it had held on the first apeal: the pervasive intentional segregation practices by the Dayton Board constitued "*de jure*" (or unlawful) segregation and rendered the system "dual" (or unconstitutionally segregated). App. 89a-90a; see also, Statement, *supra*, at pp. 4-5. In so many words, the Court of Appeals stated that in so-called "Northern" school segregation litigation, substance not semantics must govern the constitutional inquiry—the very message which this Court made clear in *Swann* and *Keyes*. That the Court of Appeals in this case thus properly performed its appellate function with respect to one of its district courts surely presents *no* conflict or issue worthy of review by this Court, particularly from the Court of Appeals' judgment on the third appeal following this Court's denial of certiorari from that holding on the second appeal. See, 423 U.S. 1000 (1975).

(9th Cir., 1972), cert. denied, 413 U.S. 919 (1973); *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir., 1972), cert. denied, 413 U.S. 920, 922 (1973); *Hart* v. *Community School Board*, 512 F.2d 37 (2nd Cir.), cert. denied, 417 U.S. 943 (1974); *Oliver* v. *Michigan State Board of Education*, 508 F.2d 178 (6th Cir., 1974), cert. denied, 421 U.S. 963 (1975); *Morgan* v. *Kerrigan*, 509 F.2d 58 (1st Cir., 1974), cert. denied, 421 U.S. 963 (1975), 530 F.2d 401, cert. denied, 44 L.W. 3719 (June 10, 1976); *United States* v. *School District of Omaha*, 521 F.2d 530 (8th Cir.), cert. denied, 423 U.S. 946 (1975); and cf., *Milliken* v. *Bradley*, 418 U.S. 717, 738 n. 18 (1974).

2. Contrary to the petitioners' suggestion (Pet. 19-21), the desegregation remedy ordered below does not require "racial balance" as a matter of constitutional right or remedy. To the contrary, as noted by the Court of Appeals, "the use of mathematical ratios in this case [by the District Court constitutes] no more than 'a useful starting point' in shaping a remedy for past discrimination. *Swann*, *supra*, 402 at 25." (App. 122a). Faced by over three years of Board refusal to propose or recommend any plan other than ones which would perpetuate the basically dual system of one-race schooling in Dayton, the District Court looked to the racial composition of the school district as a starting point. The District Court then (a) appointed its expert as master to work with the Dayton school authorities on a broad guideline which would "permit black enrollments at particular schools to range between 33% and 63%" (App. 121a) as a starting point; and (b) established guidelines for elementary students to keep the time and distance of busing to a minimum. App. 102a-104a; 119a-120a. The Board, working with the Master, was then given (a) the discretion to implement any effective plan (e.g., App. 101a-102a, 109a), and (b) the flexibility to di-

verge from the broad range to accommodate legitimate educational concerns and any schools which might be geographically isolated and thus beyond reasonable time and distance limitations. App. 106a, 109a; App. 119a. Cf., *Swann*, 402 U.S. at 24-31.

The Board, to the District Court's satisfaction, showed a need to exempt "rising" high school juniors and seniors from the plan. This resulted in projected enrollments for the 1976-77 school year ranging from 23% to 78% black in high schools under the final plan. However, the Board made no claim and offered no proof showing the geographic isolation of any school or pupil or excessive time or distance of transportation. The Board simply failed to meet its burden to show why other schools or grades should remain one-race or substantially disproportionate. See, *supra*, pp. 6-10. Compare *Swann*, 402 U.S. at 24-31.

Finally, the District Court's judgment, by its own terms, applies only to the 1976-77 school year. And any modifications sought by any party are governed by the decision in *Spangler*, U.S. (June 28, 1976), 44 L.W. 5114. (App. 121a-122a).

In sum, there should be no question that the remedial plan has been ordered by the courts below "to accomplish desegregation of a school system in accordance with *Swann* and not for the purpose of achieving a racial balance." *Drummond* v. *Acree*, 409 U.S. 1228, 1231 (1972) (Powell, Circuit Justice).[13] See also, *Keyes* v. *School District No. 1*,

[13] The District Court's occasional use of the words "balance" or "racial balance," like its use of the word "dual," gives rise to semantic problems. In both instances, the District Court was not using these phrases as they have been defined by recent caselaw and made into almost legal terms of art. Compare Note 12 *supra*. The District Court, however, was fully cognizant of the limitations which *Swann* places on the equitable powers of courts to remedy *de jure* segregation. E.g., App. 103a-104a (quoting *Swann*, 402 U.S. at 24); R. 315. And, as detailed in the text, the District

521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) and cases cited in text at Note 12, *supra.*

3. The Procedural issues sought to be raised by the Dayton Board concerning the purported lack of standing and of a class action (Pet. 22-25) are spurious. These issues were resolved adversely to the Dayton Board in the initial decree of the District Court (App. 1a). On its cross-appeal from that ruling, the Dayton Board raised these issues; but the Court of Appeals found the contentions of the Dayton Board "to be without merit." (App. 69a). Having lost its cross-appeal, including on the standing and class action issues, the Dayton Board chose, however, not to petition for a writ of certiorari. The Dayton Board *never* again raised the standing and class action issues before either the District Court or the Court of Appeals through countless proceedings on remand, the two subsequent appeals, and a petition for writ of certiorari. Apparently unwilling to accept the long-standing law of the case, the Dayton Board now seeks to resurrect these procedural issues in its latest certiorari petition.

This procedural claim of the Dayton Board is also without merit. As noted, in their initial decrees in this protracted litigation, the lower courts held "this is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education." (E.g., App. 1a).

Court did act in fact in accord with *Swann* in the face of the Dayton Board's continuing default. Finally, it should be dispositive that the Court of Appeals scrutinized the record and the District Court's judgments in light of the District Court's loose use of language in order to make sure that substance not semantics would govern his case for remedy just as for violation. Exercising its proper appellate function, the Court of Appeals made sure that the District Court's processes and final orders adhered scrupulously to *Swann, Keyes, Milliken* and *Spangler.* E.g., App. 118a-123a; App. 89a-96a; App. 67a-68a.

Plaintiffs' standing to bring such an action cannot be seriously contested fourteen years after *Brown.* And counsel for plaintiffs are aware of no school case where more Black citizens personally testified so movingly at trial of their direct experiences with the *de jure* practices of their school district and their personal stake in rooting out racial discrimination from their public schools. Contrary to the assertion of the Dayton Board in their petition (Pet. 23-24), it is manifest that the courts below held that the Dayton school system was unconstitutionally segregated and that children were thereby effectively excluded from or assigned to schools on a racially discriminatory basis. See App. *passim.* From the inception of this litigation, and long before, this cause of action has been no idle sport to plaintiffs.

Nor can there be *any* doubt that a school desegregation case is properly maintained as a class action. The Notes of the Advisory Committee on the 1966 Amendments to Rule 23 point to civil rights cases, and school desegregation cases in particular, as the archetype for Rule 23(b)(2). This is so because racial discrimination is by definition class discrimination. E.g., *Hall* v. *Werthan Bag Corp.,* 251 F. Supp. 184, 186 (M.D. Tenn., 1966); *Potts* v. *Flax,* 313 F.2d 284, 289 n.5 (5th Cir. 1963); *Oatis* v. *Crown Zellerbach Corp.,* 398 F.2d 496, 499 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968). Indeed, an individual parent, child or teacher of the school district is constitutionally entitled to attend a racially non-discriminatory *system* of public schooling. *Brown II,* 349 U.S. 294, 301 (1955). Each has the personal constitutional right "to attend schools which, near or far, are free of governmentally imposed racial distinctions. . . .;" and their school desegregation action is directed at the "*system-wide* policy of racial discrimination." *Potts* v. *Flax,* 313 F.2d 284, 288-290 (5th Cir. 1963).

4. The Dayton Board's last claim is that any desegregation plan for Dayton involving pairing or clustering should be rejected because it will lead to "resegregation" or "white flight." See, Pet. 16, 24-25. There was conflicting argument (and offers of proof) at the December 8-9, 1975, remedial hearings concerning the potential effect of the alternative plans on "white flight" or "resegregation." The Board, without proposing or otherwise supporting any plan, had its attorneys argue that a "choice" plan would be more "stable" than a "pairing" or "rezoning" plan. Plaintiffs countered with evidence showing that such claims of "resegregation" and "white flight" resulting from actual desegregation were factually unsupported. In its evidentiary rulings the District Court indicated its view that any such evidence of opposition to desegregation was not legally cognizable as a reason for limiting or delaying otherwise constitutionally required desegregation (E.g., R. 8-9, 53-54, 129, 282-285, 440-441).

In any event, the December 29, 1975 order and subsequent events rendered the issue moot. The District Court adopted neither plan but rather allowed the Board to adopt either plan, subject to the supervision and report of the court-appointed Master and review by the Court. See Statement, *supra* pp. 7-8. At the subsequent hearing in March 1976, the Dayton Board objected to the Master's "choice" plan for high schools and presented evidence in support of an alternative "pairing" and "rezoning" plan. The Board asked the District Court to substitute the "rezoning" plan for the Master's "choice" plan at the high school level. See, Statement, *supra*, p. 9. The District Court acquiesced in the Board's request for modification by permitting the Board to implement *either* the "pairing-rezoning" or "choice" plan (App. 11a, 115a). In these circumstances, it seems to us that the attempt by the Dayton Board to raise

in the Stay Application "resegregation" or "white flight" claims on this record is totally frivolous if not estopped.[14]

Indeed, the Board's "resegregation" claim, in and of itself, is repugnant to the Constitution. In the Board's petition (at pages 16, 25-26) this Court is "frankly told" that without ultimate rejection of a desegregation plan designed to remedy the constitutional violation "it is apprehended that white students will flee the school system altogether":

> But it should go without saying that the vitality of these principles cannot be allowed to yield simply because of disagreement with them. *Brown* II, at 300.

Monroe v. *Board of Commissioners*, 391 US 450, 459 (1968).

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[14] The reference to the Dayton Board petition at (25) to "testimony of plaintiffs' own witness" to the effect that clustering and pairing would cause "white flight" is wholly misplaced. First, that testimony comes not at all from the December 8-9, 1975, remedial hearings which shaped the final desegregation plans after the second remand; rather, it comes on the first remand from evidentiary hearings in February, 1975, which were naught but a side detour in this protracted litigation. See, Statement, *supra*, pp. 4-5. Second, the testimony is that of a managing agent of an adverse party (the State defendants) who was hostile and whose testimony was never "vouched for" by plaintiffs. Third, plaintiffs introduced substantial direct testimony and made extensive offers of proof at the February, 1975 hearing and again in the December, 1975 remedial hearing to rebut the Dayton Board's "white flight" claim. Fourth, the Board was given discretion to develop and implement any effective desegregation plans; but the courts below would not brook the Dayton Board's attempt to limit its constitutional obligation to eliminate *de jure* segregation by claims of "white flight." (Moreover, the Dayton Board's apparent insinuation, Pet. 25, that pupils have already left the Dayton schools over the past five years as a result of a "forced busing plan" is ludicrous; for there has been virtually *no* effective, full time desegregation in Dayton prior to this fall.) To put the point directly, the Board's presentation of the "white flight" claim to this Court, as to the courts below, is a sham.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petition for a Writ of Certiorari should be denied forthwith.

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